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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. CHICO ROMERO WATTS,[1] Defendant and Appellant.	C056491 (Super. Ct. Nos. 06-1011, 06-1047, 06-1416)

APPEAL from a judgment of the Superior Court of Siskiyou County, Robert F. Kaster, Judge, and John F. Kraetzer, Judge (Retired Judge of the Siskiyou Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, the introduction, Part I and the Disposition of this opinion are certified for publication.

[1] Defendant indicated in the trial court that his birth name is actually Chico Romero Flood.

These three matters proceeded simultaneously in the trial court without formal consolidation. In a joint trial of case Nos. 06-1011 and 06-1047, a jury found defendant Chico Watts guilty of being a convicted felon who possessed a firearm, and who possessed ammunition on two different occasions. (Except as to conduct credits, defendant does not claim any error regarding either of these cases. We will therefore only refer to them, when necessary, as the two "possession cases.") In the subsequent trial in case No. 06-1416, a jury convicted defendant of two counts of battery (as lesser included offenses of the charges of rape and sodomy), infliction of corporal injury on a cohabitant, assault likely to result in great bodily injury, false imprisonment by violence, and battery resulting in great bodily injury; it also sustained a number of enhancement allegations. The trial court sustained recidivist allegations (as well as allegations that defendant committed these offenses while on bail for the possession cases) and sentenced defendant to state prison.[2]

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[2] The abstract of judgment is not an accurate summary of the oral pronouncement of judgment (or the minutes). The trial court stayed punishment on four of the convictions and one enhancement. (Pen. Code, § 654 (hereafter, undesignated section references are to the Penal Code). However, the abstract of judgment does not reflect either the existence or disposition of these convictions. While neither party raises the issue, we must nonetheless direct the court to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

On appeal, defendant contends that the court improperly denied his request to represent himself; abused its discretion in ordering physical restraints of his person during trial; failed to instruct sua sponte on jury unanimity in connection with one offense; improperly sustained the enhancement allegations that were the subject of the court trial; and improperly denied him conduct credits for his presentence custody in the possession cases. He also presents a laundry list of misconduct on the part of the prosecutor. We shall affirm and direct the trial court to correct the abstract of judgment. In the published portion of the opinion, we conclude that the trial court properly denied defendant's request to represent himself. This is because his conduct in court prior to trial demonstrated that he was unable to follow procedural rules and legal protocol.

Defendant's arguments on appeal do not implicate the facts of the underlying offenses and we do not find any error requiring us to assess prejudice. Therefore, we will omit them except as is necessary to give context to our Discussion.

DISCUSSION

I

Defendant contends that Judge Robert Kaster, who presided over his superior court arraignment in all three cases on November 7, 2006, committed reversible error in denying the timely exercise of his right to self-representation at trial. (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*).) This requires us to begin with a summary of Judge

Kaster's previous interactions with defendant before returning to the hearing in November on which defendant relies.

A

Defendant's initial appearance before Judge Kaster was on May 22, 2006, in the second of the possession cases. In response to the court's questions, defendant stated that it was his intention to retain counsel, but that he could not accomplish this while in jail. With defendant's assent, Judge Kaster appointed the public defender provisionally as counsel in both possession cases until there was a resolution of the question of representation. Two days later, a deputy public defender appeared with defendant before Judge Kaster in the other possession case, at which point defendant suggested that he would be soon retaining private counsel.[3]

While on bail, defendant committed the offenses against the victim in case No. 06-1416. Appearing for his arraignment on these charges on July 11, 2006, defendant said that "Mr. Kolkey out of Oregon"[4] would be appearing for him. The judge presiding denied bail in the matter and reset the arraignment for the following day. At that hearing, however, the judge stated that "Mr. Kolkey has notified the clerk's office that you did not make arrangements as far as he was

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[3] Ultimately, the public defender determined that defendant did not qualify financially for the office's services, and that in any event, representation of defendant presented a conflict for the office.

[4] Terry Kolkey, Esq., of Ashland, Oregon.

concerned for him to represent you." A lawyer appearing specially for Mr. Kolkey persuaded the judge to grant a continuance of a few days.

Like Vladamir and Estragon awaiting their Godot,[5] the court granted further postponements of the three cases in anticipation of the appearance of defense counsel.[6] At last, the cases came once again before Judge Kaster on July 25, 2006, where the public defender made a final appearance on behalf of defendant. Defendant said that attorney Kolkey had asked him to make three requests from the court in his own behalf. "He would like for me to have some law time to approach the law library" and a need for "time with the telephone to reach him"; defendant noted at this point that his "semi-dementia [was] sending [him] downhill." After Judge Kaster asked whether defendant was reasonably likely to retain Kolkey (or another attorney) in the near future, defendant stated that "there [are] a lot of issues that are not yet brought to the surface that have been causing me to create [*sic*] my first seizure yesterday. I had a seizure in my cell." He also claimed that "they keep putting these

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[5] Beckett, Waiting for Godot: a Tragicomedy in Two Acts (Grove Press 1954) [a play in which two characters wait for someone named Godot, who never arrives].

[6] At one of these hearings, defendant asserted an interest in representing himself, but agreed to consult with the public defender of the day before making his decision. The next day, he was again asserting his intent to engage Kolkey's services and asking for more time to achieve that goal. He also abjured any renewal of a desire to represent himself when he appeared before Judge Kaster on July 25, 2006.

people in front of my cell when they let me out to have a conflict or a fight. All these things, they keep me locked down."

Defendant then remembered the third request, which he expressed as his need for medical attention and medication. Judge Kaster told him that he was not going to make any sort of ruling on these requests until there was an indication of Kolkey's intent to appear, and that his cases could not be continued indefinitely. At this point, defendant launched into a complaint that the court "would have to listen to my ex [the victim], and she's got her hand up in the air, and she would like to say something to you because at this particular point, we're going to be finding myself quite incompetent and not able to carry on through things because it seems like [a] . . . biased situation [is] going on here, and I'm not going to be able to do any fair ball[-]playing if I don't have fair cards [*sic*]. And we probably need to learn how to make motions to have you removed from the bench and have someone else replace and do something here to help me and not smash me because you've already said that my words are probably not credible" (a reference to Judge Kaster's remark to this effect when requesting permission to contact Kolkey directly without defendant as an intermediary).

After interjections from the victim (who apparently was trying to return personal effects to defendant in jail) and defendant, in the course of which Judge Kaster learned that defendant did not have phone privileges because he was on

disciplinary lockdown (the most recent incident occurring before the hearing), Judge Kaster announced an intent to appoint counsel for the limited purposes of an inquiry into the competency of defendant to stand trial, and "of trying to ascertain . . . if he is operating under some sort of mental disability . . . short of declaring him . . . incompen[t] to stand trial." Defendant interjected that this would be a waste of time and money.[7]

Two days later, defendant appeared before Judge Kaster. Attorney Kolkey made a telephone appearance. He stated that the funds for a retainer were not presently available, and therefore his potential representation of defendant was uncertain. Judge Kaster reiterated that he wanted to appoint counsel on the issues of defendant's competence to stand trial and to represent himself. To this end, he had requested an attorney's presence, who accepted the court's appointment for this task.

In a status report at a hearing a few days later, competency counsel said that he had met with defendant for several hours over the weekend. Defendant unequivocally withdrew any request to represent himself. As for defendant's overall competence to assist in his defense, competency counsel offered a professional opinion that defendant satisfied this

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[7] As Judge Kaster later noted, he was apparently aware of "past cases and issues that have come up relating to [defendant's] competency"; based on this information and the "things that have manifested themselves" in the current proceedings, "certainly it's fair to have a discussion about mental competency to stand trial."

standard. Defendant was not a particularly difficult client once he understood what was happening, even if initially upset. Kolkey had several meetings with defendant at the same time, and he had suggested that the court appoint him to represent defendant while working out the finances for either a retainer or for reimbursing the court; he also concurred with competency counsel's conclusions. Judge Kaster indicated his approval of the proposal to appoint attorney Kolkey.

On August 8, Kolkey finally appeared in person with defendant before Judge Kaster. Kolkey accepted appointment as counsel in the three pending cases. During the course of discussing the need for medical attention and phone and library access, defendant noted that he had started taking medication for controlling his temper.

The following month, Kolkey notified Judge Kaster that defendant wished to move for the substitution of appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118.) In the course of complaining about his counsel's failure to act on various matters, defendant admitted that he would "lose track here because of organic brain dementia, apnea from Alzheimer's. If you recall, many times we try to do the incompetency hearing but unfortunately the doctors find me very competent. Just the fact that I have organic brain memory lapse and damage from head trauma. Lack of oxygen and blood to the cerebellum. [¶] I also have a cancer. I can't focus all the time and stay functioning." Kolkey noted that defendant wanted his constant presence seven days a week, and wanted his focus to be on

defendant's civil legal problems; while defendant communicated clearly and logically for short periods of time, it was difficult to keep him focused on his criminal case.[8] After Judge Kaster found that defendant had failed to establish any inadequacies on the part of Kolkey and rejected defendant's assertion of a conflict of interest, defendant stated, "Then what is it you want me to do? You want him to speak for me? I say he does not represent me, speak for me. I would represent myself before I let him represent me . . . ." Back on the record, the court found substantial evidence to doubt defendant's competence to stand trial, based on all that was in the record and in defendant's history.

On October 13, Judge Kaster found defendant competent to stand trial based on the examiners' reports to that effect. He also determined that defendant had withdrawn his request to represent himself.

On the date of the preliminary hearing in the three cases, defendant appeared with Kolkey before another trial judge acting as the magistrate, and asserted that he had been seeking to retain different counsel, with whom he had recently spoken and about whom he was "90 percent sure he's going to be representing me." Defendant referred to having difficulties cooperating and coordinating with Kolkey (whom he accused of telling lies,

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[8] Shortly before the *Marsden* proceedings, Judge Kaster had denied Kolkey's request for appointment of pro bono counsel in defendant's civil matters.

refusing to accept his phone calls, and failing to meet with him). The prosecutor objected, noting that several law enforcement officers were present to testify and his own schedule for the following month was already full. The magistrate noted that in-custody preliminary hearings were held only once a week. The magistrate stated that he would not continue the preliminary hearing unless the arrangements with new counsel were past the preliminary stages.

The clerk summoned from another department the attorney defendant had identified. He told the magistrate that after defendant's initial contact three weeks earlier, the retainer agreement was still uncertain. The magistrate denied the request for a continuance to retain new counsel, but held another *Marsden* hearing based on defendant's complaints about Kolkey. After the hearing, the magistrate declined to substitute counsel.[9] Kolkey then appeared for defendant at the preliminary hearings. During the preliminary hearing in case No. 06-1416, the magistrate granted defendant's request to

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[9] As we do not have any indication that Judge Kaster was privy to the substance of this *Marsden* hearing, we will not attempt to summarize its contents. We simply note that after some 40-odd pages of rambling discourse from defendant (interspersed with occasional responses from Kolkey regarding any allegations that involved him), the magistrate concluded that Kolkey had been providing effective representation to defendant; to the extent there was a difficulty in their relationship, this was "not because of Mr. Kolkey's . . . actions or inactions, but rather because [defendant's] understanding of what the court process is is not, perhaps, as thorough or sophisticated as it might be."

be removed from the courtroom because of his stated inability to restrain himself while listening to testimony of the witnesses.

B

We now come to the November 7, 2006, hearing on which defendant has narrowly focused his argument. After Kolkey waived formal arraignment, defendant interjected himself into Judge Kaster's discussion with counsel about the scheduling of the cases. He claimed that he had not spoken with Kolkey since the preliminary hearings, contended that he did not know "if we even need the jury trials on some of this stuff," and asserted that he "would like to . . . have another *Marsden* hearing and try to represent myself . . . ." He reiterated his complaints about his inability to understand or communicate as a result of his disabilities and his lack of access to a telephone, and claimed the need for an attorney who could understand him.

Judge Kaster noted that the record showed that there had been two previous *Marsden* hearings. When he asked defendant if that was his intention, defendant answered, "That's in part." After once again asserting his desire for more frequent access to communication and alluding to his disabilities and his memory problems, he said, "I'm asking if I can represent myself, and I'm also asking if I can also have some assistance to some law library and telephone service, sir."

Judge Kaster found that the request for a *Marsden* hearing "was very equivocal" and denied it on that basis, subject to renewal in light of anything new. As for the *Faretta* request, "the proceedings . . . in these cases, including ones that I

have specifically presided over and also [the preliminary hearings], indicate[] to me that there is simply no way that [defendant] . . . would be granted the right to represent himself. I am absolutely not going to grant that. And it's not a matter of competency, it's a matter of whether or not [he] will conform sufficiently[] his conduct[] to the rules of procedure and courtroom protocol. That if he represented himself, I'm just absolutely satisfied that the proceedings would be unacceptably disrupted, and there's no way justice could be accomplished."

Defendant continued to interject himself at length into the proceedings over the next few pages of transcript. After Judge Kaster admonished him not to interrupt the conversation with the attorneys one more time, defendant nevertheless asserted that he was "representing [himself]," at which point Judge Kaster had the bailiff remove defendant from the courtroom.

After defendant's removal, Judge Kaster stated, "it's this kind of behavior that has occurred today and has occurred . . . [in] other court proceedings that is so . . . disruptive that if [defendant] were to be his own counsel . . . there is no way that any kind of a meaningful trial could proceed. [¶] And we have been through proceedings . . . to determine his competency. Two psychologists . . . told the court that he is competent to stand trial. I think the standard for competency to stand trial and the standard for competency to waive counsel are the same.[10]

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10 Judge Kaster was correct. (*Godinez v. Moran* (1993) 509 U.S.

But that's not the issue that I'm looking at here. [¶] The issue that I'm looking at is whether or not [defendant] would be sufficiently in control of the situation to be able to be his own lawyer without having the proceedings . . . in total shambles without any direction whatsoever and without any kind of justice being accomplished."

C

Defendant contends that he made a timely request for self-representation. He argues that Judge Kaster lacked discretion at that point to do anything other than grant the request because his behavior at the November 7 hearing was only in response to the denial of this right, and did not in any way obstruct the orderly conduct of *trial*. This takes too narrow a view of the law and the facts.

We review the *entire* record de novo to determine whether a defendant validly exercised the constitutional right to have "'a fool for a client.'" (*People v. Dent* (2003) 30 Cal.4th 213, 218; *People v. Koontz* (2002) 27 Cal.4th 1041, 1070; see *People v. Marshall* (1997) 15 Cal.4th 1, 24-25; *Faretta*, *supra*, 22 U.S. at p. 852 [dis. opn. of Blackmun, J. [reciting the old cliché].) As a result, while we will give deference to a trial court's characterization of defendant's statements, this does not bind us. (*People v. Barnett* (1998) 17 Cal.4th 1044,

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389, 400-401 [125 L.Ed.2d 321]; *People v. Welch* (1999) 20 Cal.4th 701, 732.)

1087; *Marshall*, *supra*, 15 Cal.4th at p. 25; *People v. Clark* (1992) 3 Cal.4th 41, 116.)

The right to self-representation is unconditional when a defendant makes a reasonably timely request (whereas an untimely request is subject to the trial court's discretion based on prescribed factors). (*People v. Windham* (1977) 19 Cal.3d 121, 128-129 & fn. 5.) The request, however, must be unequivocal *and* must not be an ill-considered decision that is a function of annoyance or frustration. (*Marshall, supra,* 15 Cal.4th at pp. 21-22.) Moreover, a defendant requesting the right of self-representation must possess the ability and willingness "to abide by rules of procedure and courtroom protocol." (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 173 [79 L.Ed.2d 122].)[11]

Defendant is incorrect in asserting that only his conduct *at trial* could have warranted the denial of his *Faretta* request. It is also relevant that before trial defendant continuously manifested an inability to conform his conduct to procedural rules and courtroom protocol. It would be a nonsensical and needless waste of scarce judicial resources to proceed to trial when, as here, defendant has shown by his conduct during pretrial proceedings that he is unable to conform to procedural rules and protocol.

Ferrel v. Superior Court (1978) 20 Cal.3d 888 is not apposite, as it involves *extrajudicial* conduct resulting in

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[11] As noted above, Judge Kaster used this exact phrase in his denial of the November 7 request.

the revocation of pro se jail privileges, which did not justify the revocation of the right of self-representation. *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1530-1531, is also inapposite because the record lacked *any* evidence of disruptive behavior on the part of that defendant other than as a frustrated response to the court's erroneous denial of his request. Equally off point is *People v. Poplawski* (1994) 25 Cal.App.4th 881, 889-891 (and the federal case it cites), which hold that an inability to represent one's self *effectively* is not within the definition of conduct that is obstructive or threatens the dignity of the proceedings, and therefore cannot justify a denial of a *Faretta* request.

As our lengthy recitation of the facts leading up to the November 7 hearing demonstrates, defendant repeatedly requested to represent himself whenever Judge Kaster did not rule as he desired. He would then withdraw the request once the heat of the moment passed. He does not identify any point in the record after the November 7 hearing that shows any interest on his part in renewing his request for self-representation. Thus, on this record, it is questionable whether defendant's request on November 7 was unequivocal and not a function of pique.

Nonetheless, like Judge Kaster, we find dispositive defendant's demonstrated inability to conform his behavior to the rules of procedure and courtroom protocol. Defendant was unable to control himself even when acting under the guidance of counsel. We therefore conclude there was a proper basis to deny his *Faretta* request.

II

A

In February 2007, Kolkey filed a motion to withdraw as defendant's attorney based on defendant's refusal to cooperate with him, which was due in part to defendant's documented organic brain damage. At a February 21, 2007, hearing, defendant withdrew his pending request for substitution of counsel (asserting that his "medication [was] work[ing]"), and the motion to withdraw did not come up for discussion.

On the eve of defendant's trial on the possession cases, Kolkey again moved to withdraw as counsel. He now asserted that defendant had been growing increasingly antagonistic. He suggested at the hearing that a denial of his motion would lead to him requesting that defendant be physically restrained at trial. Judge Kaster expressed his doubts that defendant would be any more cooperative with another attorney (given his history in the present cases and other cases over which Judge Kaster had presided in the past), and queried whether this increased level of antagonism was simply manipulative behavior. He also did not want to continue the trial since the cases had been pending for nearly a year. He therefore denied the motion to withdraw.

After a hearing in camera with Kolkey and defendant, Judge Kraetzer ordered defendant to be physically restrained at the trial on the possession cases. The basis for the order was

Kolkey's fear for his own safety, a fear based on the nature of defendant's interactions with him.[12]

In pretrial proceedings on May 29, 2007, before the start of defendant's next trial, Judge Kraetzer stated his shackling "decision was relevant as far as I'm concerned only in that case[,] and . . . it is necessary to consider the issue again in this case." He asked for input from Kolkey on this question at another hearing in camera.

At this hearing, Kolkey repeated the difficulty he had with requesting the court to order the shackling of his client, because this posed a high degree of prejudice. (At the hearing in April, Kolkey disclosed that this was the first time in 25 years of practice that he had made such a request.) However, he continued to have serious doubts about his own safety with respect to his client, which would interfere with his ability to conduct the trial. He referred to the record he made at the prior hearing in camera "of the degree of hostility that [defendant] expressed in the couple of months leading up to the last trial; and the degree of hostility and anger he expressed in saying he was not going to let me be his attorney and he would do whatever it takes [to keep me from] represent[ing] him."[13] At the jail, Kolkey had had "numerous" conversations

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[12] The April 24, 2007, hearing in camera is part of the record on appeal.

[13] At the prior hearing in camera, Kolkey estimated that defendant was "6'2," 220 pounds or so," and there were records indicating that defendant was "in the past, in special forces

with defendant where the latter was "loud, aggressive, and angry with me." While defendant did not exhibit any problems during the three days of the first trial, defendant's conduct had reverted to the same level of hostility in the two weeks since the end of that trial. When Kolkey had spoken with defendant earlier that day, defendant "didn't allay my concerns at all when I asked is there going to be a problem . . . . He said the words no, there's not going to be a problem, but the degree of combativeness and anger in his voice as he said that told me . . . just the opposite." Defendant denied any intent to harm his attorney, and claimed that he had never struck a lawyer or a judge.

Judge Kraetzer noted that he had previously denied Kolkey's request to be relieved as defense counsel based on these reasons, and therefore the problem was longstanding. The judge previously had found that there was a need to shackle defendant because defense counsel had sufficiently demonstrated a risk of injury and would be seated right next to defendant, which would prevent security personnel from being able to respond quickly enough. Mere leg shackles would also not suffice under these circumstances. Kolkey agreed that defendant could have one hand free. Judge Kraetzer previously had expressed the opinion that it was better to instruct jurors to disregard the restraints rather than trying to conceal them (which would be difficult to

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and received training in combat."

do in any event), and he reiterated his intent to instruct the jury to this effect at the second trial as well.[14]

B

A defendant is subject to physical restraint only upon a finding of manifest need based on an affirmative showing of the defendant's expressed intent to escape (which is not an issue in the present case), past violence or the threat of violence, or other nonconforming conduct that has disrupted the proceedings or will disrupt them in the absence of restraints. (*People v. Vance* (2006) 141 Cal.App.4th 1104, 1112.) The trial court must make this finding based on an exercise of its independent judgment on the *facts* presented to it; it cannot abdicate this determination based on the conclusions of the court's security personnel or others. (*Ibid*.)

As the People concede, defendant presents an accurate eight-page analysis of the law governing the physical restraint of a defendant at trial. However, he falters in his effort to apply these principles to the present facts.

Defendant asserts that "it appears that the trial court simply deferred to trial counsel's expressed fear . . . . There was no particular evidence that [defendant] had an intention to harm [him]. . . ." He attempts to analogize to *People v. Cox*

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14 We have only the copy of the pattern instruction appearing in the clerk's transcript because the parties stipulated that the court reporter did not need to transcribe the oral rendition of the instructions. (See *People v. DeFrance* (2008) 167 Cal.App.4th 486, 496 [expressing disapproval of this practice].)

(1991) 53 Cal.3d 618, in which defense counsel attested to the discovery in his investigation of the case of the possibility of an escape attempt. The court did not inquire into the *facts* that underlay defense counsel's *conclusion*. (*Id.* at p. 650.) When defendant appeared in court on a later date with enhanced restraints, the trial court answered defense counsel's inquiry with a reference to third-hand hearsay it had received from its bailiff about rumors circulating at the jail that an unspecified escape attempt might take place. (*Id.* at pp. 650-651.) As *Cox* asserted, "the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney." (*Id.* at p. 652.)

Cox is manifestly inapposite. Kolkey described his own firsthand perceptions of defendant's behavior and demeanor, which *are* the *facts* underlying his conclusion that he was at risk of injury from his client. Although appellate counsel blithely asserts that "stationing a bailiff or sheriff's officer in the court" would "protect the attorney," this disregards Judge Kraetzer's express finding to the contrary that we have mentioned above, and bespeaks unseemly second-guessing on the part of one perusing the transcript at a safe remove from the situation. In short, Judge Kraetzer did not abuse his discretion, and the "human dignity of the accused" and the "fundamental dignity of the court" were not improperly trammeled.

III

The trial court instructed the jury in connection with the charged assault and battery counts that it must unanimously agree on the acts underlying these offenses. Defendant contends the court erred in failing to expand this unanimity instruction to include the charge of corporal injury of a cohabitant (section 273.5).[15] He is mistaken.

A unanimity instruction is *not* required in connection with section 273.5 because it contemplates the prosecution of a "continuous course of conduct" in the form of a *series* of acts. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224-225; cf. *People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [fact that a continuous course of conduct can constitute single violation of section 273.5 does not prohibit prosecution from charging defendant with more than one violation based on his course of conduct].)

Defendant refers us to *Richardson v. United States* (1999) 526 U.S. 813 [143 L.Ed.2d 985], which involved a question of legislative intent underlying a *federal* statute in order to avoid constitutional problems under the *federal* charter.[16]

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[15] Again, we have only the copy of the pattern instruction that appears in the clerk's transcript.

[16] Specifically, the high court found that a federal statute that punished "'a continuing series of violations'" of federal antidrug laws required unanimous jury agreement on *each* of the underlying violations of federal antidrug statutes, rather than unanimous agreement only that there was a *series* of violations with permissible divergence as to the violations composing the series (*Richardson, supra,* 526 U.S. at p. 815); a contrary

Defendant claims this case has "called into question the validity" of the "'continuous course'" exception to the requirement under the *California* Constitution of jury unanimity, which does not exist under the federal Constitution. (*People v. Jones* (1990) 51 Cal.3d 294, 321; *People v. Vargas* (2001) 91 Cal.App.4th 506, 562.) However, the courts of this state are obligated to follow the express holdings of the United States Supreme Court *only* on issues of federal constitutional or statutory law. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1050; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 956-957; *People v. Rooney* (1985) 175 Cal.App.3d 634, 644.) In rejecting the attempted analogy of "the Government" (to use *Richardson*'s choice of phrase) to the existence of this exception under the law of various states (including California), *Richardson* found the limited situations in which this exception applied did not constitute a "general tradition or a rule," and in any event this exception under state law was not a violation of the federal Constitution. (*Richardson, supra,* 526 U.S. at pp. 821-822.) Consequently, defendant has failed to demonstrate error on the part of Judge Kraetzer in failing to instruct the jury sua sponte in this regard.

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conclusion "risks serious unfairness and lacks support in history or tradition" (*Richardson, supra,* at p. 820; see *id.* at pp. 817-818).

IV

In his April 2008 opening brief, defendant asserted that it did not appear "that either the jury, or the trial court, made a finding that [the on-bail or recidivist allegations] were true, after a hearing on the same." He therefore requested that we reverse and remand for resentencing (presumably after we vacated the various findings on these allegations).

In July 2008, the People moved to augment the appellate record with the reporter's transcript for the court's morning session on July 12, 2007 (which the reporter inadvertently had omitted from the record on appeal).[17] During this session, the court received documentary exhibits in support of the various allegations before sustaining them. Defendant moved in August 2008 to augment the appellate record with these exhibits, which the trial court filed with this court in September 2008. Defendant has not sought to file a supplementary brief raising any other arguments on the issue of the sufficiency of the evidence to sustain the various enhancements. As a result, we deem this argument forfeited. (*People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 10; *Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.)

V

Defendant contends the trial court erred in limiting his conduct credit to 15 percent pursuant to section 2933.1 for the

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[17] Sentencing and judgment occurred during the afternoon session on that date.

11 days of actual presentence custody he served in connection with his convictions in the possession cases. He contends that the *offenses* in those cases were not violent felonies, and as a result the statute did not apply.

People v. Ramos (1996) 50 Cal.App.4th 810 concluded that the language of section 2933.1, which applies "to any *person* who is convicted of a [violent] felony offense" (italics added) limits conduct credit for presentencing custody in *all* offenses that such *person* commits (*id.*, subds. (a), (c)); "by its terms, section 2933.1 applies to the offender[,] not to the offense." (*Ramos*, *supra*, 50 Cal.App.4th at p. 817.) The context of *Ramos* involved convictions for both violent and nonviolent felonies in the *same* proceeding (*Ramos, supra,* at p. 814); two other similar cases applied *Ramos* (*People v. Duran* (1998) 67 Cal.App.4th 267 & *People v. Palacios* (1997) 56 Cal.App.4th 252), as did *People v. Baker* (2002) 144 Cal.App.4th 1320, in which the defendant was granted probation on two convictions for nonviolent felonies and then was *later* convicted of a violent offense and sentenced to consecutive terms for all the offenses (*Baker, supra,* 144 Cal.App.4th at pp. 1323-1324, 1327-1329 & fn. 13), a context analogous to the case at bar.

Defendant acknowledges *Ramos* and *Baker* in his opening brief. However, he contends that *In re Reeves* (2005) 35 Cal.4th 765 interpreted *Ramos* in such a manner that it was incorrect for *Baker* to rely on the "offender[,]not . . . the offense" rationale. This would ascribe a curious duality to the workings of our Supreme Court, which after the initial filing of the

opinion in *Baker*[18] granted review on February 25, 2003 (S112982), with briefing deferred until it decided *Reeves*; well after the Supreme Court's filing of *Reeves*, it dismissed review in *Baker* and remanded it on November 15, 2006, not with any directions to reconsider the decision in light of *Reeves* but with *directions to publish it as is*. We assume the Supreme Court would not affirmatively take action to designate an opinion as binding precedent that did not accurately reflect its analysis in *Reeves*, and we will therefore adhere to the reasoning in *Baker*.[19]

VI

A

A prosecutor commits misconduct under state law through a resort to deceptive or reprehensible tactics designed to sway the verdict of the finder of fact; this rises to a violation of the federal Constitution where the prosecution's actions permeate the proceedings with a "degree of unfairness" that renders them a deprivation of due process. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) However, in order to preserve the issue for appeal, a defendant must make a timely objection,

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[18] *People v. Baker* (2002) 104 Cal.App.4th 774.

[19] The recent case of *People v. Nunez* (2008) 167 Cal.App.4th 761 is in accord (extending *Ramos* to presentence conduct credits for a defendant sentenced to *concurrent* terms). *Nunez* found that *Reeves* was not controlling on the issue of *presentence* custody credits (because the discussion of the distinction between the "merger" that occurs with consecutive sentences but not with concurrent sentences was in the context of custody credits earned *in prison*), but in any event *Reeves* had not taken any opportunity to criticize the "offender" rationale in *Ramos*.

state the grounds of the objection, and ask the trial court to admonish the jury on the subject. (*Ibid*.) This salutary remedial procedure gives a trial court the opportunity to purge any resulting taint and rein in any further occurrences; a reviewing court will deem the failure of a party to follow this procedure for registering objections as representing a willingness to participate in the atmosphere of prejudice. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) We will relieve a defendant from this rule of appellate forfeiture only where the lodging of an objection and/or admonition request would have been futile (including where the immediate overruling of an objection forecloses an admonition request), or where the misconduct is simply irremediable. (*Panah*, *supra*, 35 Cal.4th at p. 462.) A "ritual incantation that an exception applies is not enough"; the defendant must demonstrate its application in light of the record. (*Ibid*.)[20]

Defendant has collected a score of incidents from over the course of his trial (repeating some under different headings in his brief) of what he calls prosecutorial misconduct. Almost without exception, we do not need to resolve whether these were in fact misconduct because he has forfeited the right to contest them on appeal.

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[20] Although defendant does not invoke the customary rubric of ineffective assistance of counsel as a basis for evading the rule of forfeiture, we note that this type of claim can rarely succeed on direct appeal except where counsel's inaction is simply inexcusable. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

B

We first catalog the foreclosed claims. The bulk involve the prosecutor's questioning of witnesses; three involve closing arguments. In discussing each cited incident, we will not reiterate the legal principles that we have just set out above.

***1. Instances in which the Court Sustained a Defense Objection, Defense Counsel did not Request an Admonition, and a Claim of Misconduct is Consequently Forfeited on Appeal*:**

a. The prosecutor asked the deputy who had interviewed the victim after the attack, "Do you feel like if you look at someone who is telling you something, do you have a sense whether they are telling you the truth or not?" (Objection on ground that the deputy's opinion of her veracity was irrelevant; deputy did not answer the question.)

b. A witness testified that she saw defendant approach the victim (who was at a pay phone) after the attack, shouting, "'Bitch, do you want some more?'"; the witness interposed herself between them. After stating on cross-examination that she had been scared only for the victim's sake, the prosecutor asked on redirect, "Did you have any reason to believe that he was a dangerous person?" After counsel objected to the question, the witness did not answer it.

c. The prosecution questioned the victim about the effects that the attack had on her; she was undergoing therapy, and was having nightmares. When asked, she said she did not think she would have any future romantic relationships. (At this point, defense counsel objected on the ground of relevance,

but did not seek to strike her answer or object to the victim next answering that it affected her ability to "relate with men" because she was jumpy and no longer liked to be touched.)

d. At trial, the victim acknowledged that at the hospital after the attack she initially had made a false report that her cousin by marriage (Georgia) had been involved with defendant in kidnapping her, which the victim explained was out of pique at learning that this cousin "was cheating on [me with] my man behind my back"; she let the prosecutor know this at lunch on the day before her testimony. After defense counsel focused in cross-examination on this lie and the reason for it, the prosecutor sought to elicit that the rest of the witness's statements to authorities and her present testimony were the truth. Defense counsel objected to the "series of leading questions," but did not request that the answers be stricken.

e. The prosecutor questioned the victim about her statement to a deputy that there had been blood all over the house as a result of defendant striking her, which the prosecutor asserted was evident in photographs of the crime scene and on items of evidence. This resulted in a defense objection that the questioning "states facts not in evidence. No evidence of blood, just stains." The prosecutor thereafter referred to a "red-brown liquid type substance" or "the things that are brown or red that are consistent with blood." When he asked if these substances were defendant's blood, defense counsel again objected on the same basis, after which the prosecutor was able to elicit the answer that defendant did not

have any wounds that could have created the "pools of bloodlike substance that we saw." The same objection arose when a crime scene investigator (CSI) testified that he saw "quite a bit of blood" when he initially entered the house, after which point the CSI testified without objection that the stains "appeared to be blood."[21]

f. The victim had told investigators that she had offered to make a meal for defendant after he raped her to distract him and allow her to make her escape. After determining that dusk was falling at this point, the prosecutor asked, "What was going to happen to you when it got dark?" The victim testified that defendant had announced an intent to kill her after dark. The prosecutor then asked, "So did you figure -- was it your thinking -- and don't let me put words in your mouth. I don't want to do that. [¶] Was it your thinking that maybe if he is busy -- ." (Defense counsel objected that the question was leading.)

g. In cross-examining the victim about her claim that defendant forced her to stay in the bedroom when people came to visit, defense counsel asked her to name some of the visitors. The victim identified five people, among whom was another of her cousins (Christa) and the cousin's then-boyfriend. In redirect examination of the victim, the prosecutor determined (without any objection) that two of the others were drug dealers.

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[21] On cross-examination, the CSI acknowledged that he had tested only a single item in evidence for the presence of blood.

Regarding the boyfriend, the prosecutor first asked, "By 'significant other,' do you mean a person who beats her?" and then whether the boyfriend set the cousin's trailer on fire (the victim answering both questions affirmatively). The prosecutor also asked whether cousin Christa provided drugs to the victim, defendant, and others; the victim again answered in the affirmative. (Defense counsel objected that the questions about the boyfriend were leading, but did not seek to strike the victim's answers; defense counsel objected that the cousin's drug habits were irrelevant, but the court overruled the objection.)[22]

h. There had been previous testimony regarding the victim's efforts to obtain (and rescind) protective orders against defendant, and the lack of response at times on the part of law enforcement to her reports of domestic violence. The prosecutor asked the victim whether the lack of response made her "feel like they let you down[.]" The victim answered affirmatively. (Defense counsel objected on the ground of relevance, but did not seek to strike the victim's answer.)

i. In cross-examining cousin Christa, the prosecutor elicited testimony that the victim had an affair with Christa's

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[22] In later discussing the victim's lack of veracity, cousin Christa testified that she used drugs and alcohol with the victim whenever they could obtain them, and that as a result she thought that the victim "is crazy." As the substance of this testimony would be unchanged even in the absence of the challenged question to the victim on the subject, we do not discern prejudice of any sort even if improper.

boyfriend, with whom Christa no longer had a relationship. At this point, the prosecutor editorialized, "Wonders never cease for me today, do they?" In response to further questioning, the cousin denied that the affair was the reason for the breakup. The prosecutor asked if an outstanding protective order against the cousin could be a reason; the cousin acknowledged its existence based on their "fighting." The prosecution led the cousin to acknowledge her pending charges for felony domestic violence, and then asked if this might be "a little more than fighting, isn't it?" (Defense counsel objected both times to the "commentary." On the second occasion, he asked "that the D.A. be admonished to -- ," at which point the court broke him off and said, "No, we will just keep moving.")

j. The prosecutor also asked cousin Christa if one of the five visitors the victim had identified was the drug connection for the cousin (she denied it) or for defendant. (Defense counsel objected to the latter question as calling for the witness to speculate, and as being irrelevant. The cousin did not answer the question.)

k. Another CSI, who had examined the rape kit of the victim, was unable to detect any semen. The prosecutor asked the CSI whether semen or ejaculation was required for there to be a rape. (Defense counsel objected that the questions called for a legal conclusion on the part of the witness; the witness did not answer the questions.)

l. The prosecutor questioned the detective who transported defendant to jail about statements that defendant had made in the course of the trip. Defendant had determined early in the trip that the detective was recording his remarks. When the detective challenged him to explain why he had been found hiding in a closet during the execution of a search warrant at his home, defendant asked if the officers had recorded their compliance with "knock/notice" requirements (having earlier asserted that he had not heard any announcements before their entry). The detective told him that he did not know, and defendant told the detective "[t]hat he didn't do anything because it didn't happen." When the prosecutor asked, "Okay. So if it's not on the recording, he is going to -- ," at which point defense counsel interjected an objection to commentary. The next question was whether "[h]e tried to deny it when he found out it wasn't on the recording[.]" After the court overruled an objection that the question was leading, the detective answered, "Yes, he was denying [*sic*] that we didn't give him knock-notice."

m. In cross-examining cousin Georgia (who admitted to wearing an orange jumpsuit because she was serving a sentence for drunk driving that resulted in vehicular manslaughter), the prosecutor attempted to ask her the source of the methamphetamine she had used with defendant on the occasion when she had engaged in sexual relations with him. She declined to identify anyone. The prosecutor asked, "Why won't you give up names?" and if "It's kind of a code to not give up another

person[.]" (Defense counsel objected to both questions' relevance. The witness thereafter attested to the belief that it was "not safe to turn on anybody," over a defense relevance objection, and resisted the prosecutor's efforts to paint defendant as someone she would be wary of crossing.)[23]

2. *Instances in which Defense Counsel did not Object during the Prosecutor's Closing Arguments, Forfeiting any Claim of Misconduct on Appeal*:

a. At the beginning of his closing argument, the prosecutor noted that the severity of the victim's injuries was undisputed and the source of the injuries was known to only two people. He later asserted that part of his trial strategy had been to avoid refreshing the victim's recollection in any manner because he wanted "everything she said to you to be the memory. Let the chips fall where they may as far as whether the physical evidence corroborated it. And every link of it did, every bit, every bit." Defense counsel did not object at either point.

b. The prosecutor asserted that the faces of the jurors had reflected an incredulous reaction to the court's instructions on self-defense, a theory that he did not "even need to talk about that. That's probably the most ridiculous and insulting thing I've ever heard in a case. And I have heard some doozies, some real doozies." He later reiterated his

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[23] To the extent the third objection preserves defendant's argument, based on this later testimony, we cannot discern any prejudice in evidence of the policy *of the witness* to refrain from "naming names," or her *refusal* to attribute any fearsome character to defendant.

dismissive attitude to talking about the self-defense theory, although "Mr. Kolkey will." Defense counsel did not object at either point.

c. Collected under a heading of attesting to facts not in evidence are: the prosecutor's reference to finding out at lunch just before her testimony that the victim had lied about a kidnap and the involvement of cousin Georgia, that it took courage to look him in the eye and admit this, and that he had admonished her to tell the truth to the jury;[24] his references to his opinion that the mountain of physical evidence against defendant of the injuries to the victim was undisputed; his reference to the jury in defendant's previous case having rejected his claim that the victim had willingly written a letter truthfully asserting that the firearm and ammunition belonged to her (which happened to be identical to a draft in defendant's handwriting):[25] "They didn't buy it. You shouldn't either. I would be ashamed if you did"; and his assertion that defense counsel, a personal friend and excellent attorney, had begun to lay traps for the victim's credibility in the course of defendant's previous trial. Although defendant asserts (not entirely accurately) that "None of these instances were based upon testimony that was given in the trial," he overlooks the

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[24] As noted above, in point of fact the victim *had* testified to the circumstances under which she recanted this claim.

[25] This draft and letter were evidence in the present trial as well.

fact that in not one of these instances did defense counsel raise an objection.

C

Under two headings, defendant notes instances in which the court overruled defense objections to the questioning of the detective who had transported him to jail. According to the detective, defendant questioned why a rape suspect would have been allowed to shower; detective then explained for the jury that the defendant had "soiled himself" upon his extraction from the bedroom closet. Defendant also asserted to the detective that he was being "set up," but an examination would not reveal the presence of any of his DNA unless the victim had not showered since they had last "made beautiful love" a few days earlier, which would be "gross."

With regard to the victim showering, the prosecutor asked the detective, "What impression did you take from that?" The court overruled the defense objection that this called for speculation. The detective then agreed that he had the impression that defendant was trying to "explain away the possibility that there might be sperm in her[.]"

The prosecutor also asked, "How big was the gap between when he said, 'There is no sperm of mine in her' and when he made up the excuse about she didn't take a shower?" After the court overruled a defense objection that this was argumentative, the detective recalled that it was only a few words.

Defendant contends the former exchange amounted to an impermissible presentation of expert testimony to the jury

on the manner in which to interpret defendant's statements. However, this testimony did not remotely come under any guise of the detective's expertise. We therefore reject this misconduct claim.

As for the other exchange, defendant's claim of error rests on his assertion that the detective "implicitly adopted" the argumentative characterization in the prosecutor's question. We disagree with this effort to fashion error. The jury was aware that the questions of counsel are not evidence of any sort and only reflect the prosecution's point of view. The jury was perfectly capable of assessing defendant's statements for itself and to attribute to them whatever probative value they possessed.

D

To reiterate, a defendant can avoid application of the rule of forfeiture only where he demonstrates that an exception applies; rote invocation of the rule is insufficient. Defendant does not provide us with particularized reasoned argument supporting the applicability of an exception. He merely offers undeveloped claims that the instances of misconduct could not be cured; that the frequency of the misconduct made any attempt to object futile; and a claim that the court's refusal to admonish the *prosecutor* against editorializing on one occasion indicated it would be futile to attempt to obtain admonitions regarding inadmissible evidence or inferences to the *jury*. We therefore adhere to application of forfeiture.

E

One instance of cited prosecutorial "misconduct" requires separate treatment. During the prosecutor's examination of one of the deputies executing the search warrant of defendant's home (who had entered the bedroom after defendant came out of the closet), he asked, "What was his demeanor [while being talked to]?" The deputy answered, "Agitated, excited[.] I believe the first thing he said [was that] he wanted his attorney so -- ." At this point, the court sustained defense counsel's objection and granted his motion to strike. As part of its later instructions to the jury, the court included the pattern instruction that the jury must disregard any testimony ordered stricken.

Defendant asserts this was a violation of his right to an attorney, analogizing to the proscription against use of the privilege to remain silent. (I.e., *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91].) Beyond asserting that "it is difficult to remove this taint from the jury, even through an admonishment," defendant does not acknowledge the presumption essential to the system of trial by jury of the *effectiveness* of admonitions, *except* where evidence is incurably inflammatory or devastating. (*Marshall v. Lonberger* (1983) 459 U.S. 422, 438, fn. 6 [74 L.Ed.2d 646]; see *Parker v. Randolph* (1979) 442 U.S. 62, 74-75 & fn. 7 [60 L.Ed.2d 713] [plur. opn. of Rehnquist, J.]; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Anderson* (1987) 43 Cal.3d 1104, 1120-1121.) On the other hand, an admonishment will generally cure a violation that is "fairly

innocuous." (*People v. Kelly* (1981) 125 Cal.App.3d 575, 581.) The present case involves just such a fairly innocuous violation (if a violation it be); ignoring the significance that a jury might draw from defendant's own choice to secrete himself in the bedroom closet, the request for counsel in the course of an arrest does not lead irretrievably to imputing a guilty conscience to defendant. Therefore, defendant has not established any basis for reversal of the judgment in this regard.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment that conforms to our directions in footnote 2 of this opinion, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, J.*

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.